IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1087

TOBACCO WORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL 192,
Petitioner,

versus

EDGAR RUSSELL, FREDERICK D. BROADNAX,
ALVIS MOTLEY, JR., JAMES R. VAUGHN,
LAWRENCE PRICE, JR., GLEN A. LEE,
HAYWARD GILLIAM, AND JAMES R. KAYLOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and the
Associate Justices of the Supreme Court of
The United States:

The Petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the Petitioner respectfully shows to this Court:

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case has not yet been officially reported. The opinion of the United States District Court for the Middle District of North Carolina in this case is reported in 374 F. Supp. 286. Both the District and Court of Appeals opinions are included in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which Petitioner now asks this Court to review, is dated the 24th day of September, 1975, and was entered by that Court on the same date. A timely Petition for rehearing was filed on the 17th day of October, 1975, and said motion was denied by Order of that Court on November 4, 1975.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of the issuance of a Writ of Certiorari, is conferred upon this Court by the provision of 28 USC Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner, a labor union local, was ordered to pay back pay compensation to a defined class of workers by the District Court. Said order was affirmed by the Federal Court of Appeals for the Fourth Circuit on the basis that discriminatory practices were imbedded in the bargaining agreements negotiated by the union.

(1) Can the Petitioner be held liable for back pay costs

representing the years from July 2, 1965, through May 27, 1968, when the Respondents stipulated that Respondents made no contentions that they were denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local or were denied any opportunity to nominate and vote for principal officers of the union or to nominate and vote for committee men to serve on the committee charged with the receiving and processing of the grievances of the members?

(2) Can Petitioner be held liable for back pay costs assessed for black machine operators who were bumped back from their jobs after October 25, 1968, because they had not reached the prevailing rate when these actions were taken under a bargaining agreement negotiated by representatives of the local and Respondents stipulated that said bargaining agreement was unanimously adopted by a vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreement?

(3) Can Petitioner be held liable for back pay assessments for individuals who did not attain supervisory positions when the Respondents stipulated that the selection and employment of foremen and assistant foremen was the exclusive right and responsibility of the company?

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Title 7 of the Civil Rights Act of 1964, 42 USC Section 2000e-2 and § 2000e-5(g), upon which the Court of Appeals relies, reads in pertinent part as follows:

§ 2000e-2(c) – It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

§ 2000e-5(g) – If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

STATEMENT OF THE CASE

This case was brought pursuant to Title 7 of the Civil Rights Act of 1964, 42 USC Section 2000e et. seq. The judgment of the District Court was entered on March 8, 1974. Respondents below and Petitioner gave notice of appeal of this decision to

the United States Court of Appeals for the Fourth Circuit on April 3, and on April 17, 1974, respectively. The Defendant, American Tobacco Company, subsequently withdrew its appeal and this action was allowed by Order of the United States Court of Appeals for the Fourth Circuit entered on June 27, 1974. This case was argued before the United States Court of Appeals for the Fourth Circuit on January 7, 1975, and decided by that Court on September 24, 1975. Defendant then petitioned for a rehearing of this case on October 17, 1975. With some minor changes in its former opinion, the United States Court of Appeals for the Fourth Circuit denied said Petition for rehearing on November 4, 1975.

The Respondents in this case are black employees of Defendant, American Tobacco Company, at its plants located in the City of Reidsville and Rockingham County, North Carolina. The Defendant, American Tobacco Company, operates these two plants for the purposes of handling and processing leaf tobacco and the manufacturing and packaging of cigarettes. The subject matter of this case and the subsequent appeals concern employment practices of these two facilities. The Petitioner, Local 192, Tobacco Workers International Union, AFL-CIO, of which Respondents are members, represents hourly paid employees of the Defendant Company. A complaint was filed on January 5, 1968, in the U. S. District Court for the Middle District of North Carolina, Greensboro Division, alleging that Defendants were engaged in and had been engaged in discriminatory practices at the company's plants. Prior to the filing of the complaint, the Respondents had filed charges with the Equal Employment Opportunity Commission. Both Defendants moved to dismiss the action on the grounds that the complaint in the Court below had not been timely filed. Petitioner also moved to dismiss the action on the grounds that the Respondents had failed to join as party Defendants two other locals from Durham, North Carolina, and Richmond,

Virginia. These motions were denied on January 20, 1971. The Court allowed the action to proceed as a class-action under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. After the trial and before the determination on the merits, Petitioner moved to amend its Answer to set forth a defense of estoppel on the grounds that the Respondents and members of their class had unanimously approved the 1971 collective bargaining agreement containing a seniority provision at issue in the case. The Court allowed the amendment on January 18, 1972. The case was tried before Judge Eugene A. Gordon on November 1-3 and 8-11, 1971. A memorandum opinion setting forth findings of fact and conclusions of law was entered by Judge Gordon on January 18, 1973. A copy of said memorandum opinion and order is included in the appendix herein. The decree entered on March 8, 1974, listed the individuals entitled to relief as follows: (1) All blacks employed by the company at "branch" prior to January 1, 1955, and who continued to be employed between January 2, 1965, and May 27, 1968, and who had been denied a promotion in preference to a junior white employee; (2) The class also included those blacks who had worked as machine operators for 35 or more days and who had been demoted from these jobs at any time from October, 1968. Following the decision rendered by the United States Court of Appeals for the Fourth Circuit, Petitioner received a Stay of Mandate pending the filing of a Petition for a Writ of Certiorari in this Court. The basis of this Petition concerns certain stipulations made by Respondents in Volume 2 of the joint Appendix-Exhibits which was filed with the United States Court of Appeals for the Fourth Circuit. Those stipulations are as follows: (1) Respondents make no contentions in this action that since July 2, 1965, black members of the local have been denied an opportunity to nominate and vote for principal officers of the local or that black members of the local have been denied the opportunity to nominate and vote for committee men to serve on the committee charged with receiving and processing

the grievances of the members; or that members of the local have been denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local. (Stipulation "m" page 340 of the joint Appendix)

(2) The selection and employment of foremen and assistant foremen is the exclusive right and responsibility of the company. (Stipulation "p" page 340 of the joint Appendix)

(3) The collective bargaining agreements executed January 26, 1968, to be effective from January 15, 1968, with respect to both seasonal and regular employees, were unanimously adopted by vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreement. (Stipulation "r" page 340 of joint Appendix)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The decision of the Fourth Circuit Court of Appeals in this case is based on the conclusion that the union arbitrarily bargained away the rights of the Respondents to secure fair employment from the Defendant, the American Tobacco Company, and that the employment agreement negotiated through the process of collective bargaining by the union was forced upon the Respondents against their will and in opposition to their express desires. These conclusions reached by the Fourth Circuit Court of Appeals are not only contrary to the facts as presented in the District Court, but also stand in direct opposition to evidence presented to the Fourth Circuit Court of Appeals in the form of stipulations in which Respondents freely concurred. The Fourth Circuit opinion considers the Respon-

dents to be disadvantaged union members who were unwillingly forced to acquiese to unfair employment conditions. In support of its decision to allow back pay awards in favor of the Respondents and the class they represent and against the Petitioner, the Fourth Circuit cites as authority the case of *Steele v. Louisville and Nashville R. R. Company*, 323 U.S. 192 (1944). An analysis of that case reveals a factual situation which is far different from the case which Petitioner now seeks to present to this Court. In *Steele*, the Plaintiffs were black employees of the Defendant Railroad who were systematically and conclusively excluded from membership in the Brotherhood of Locomotive Firemen and Engineermen, the exclusive bargaining agent recognized by the Railroad. The constitution and ritual of the Brotherhood totally excluded black workers from membership and, consequently, excluded them from having any voice or effective representation in the drafting and acceptance of bargaining agreements. The Brotherhood had negotiated a bargaining agreement which provided that:

> Only white firemen can be promoted to serve as engineers, and the notice proposed that only 'promotable,' i. e., white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs. [1]

These provisions would have ultimately excluded blacks from all the decent jobs covered in the agreement. These acts were obviously unlawful and rightfully struck down by this Court; but an analogy between the facts presented in *Steele* and those facts presented in Petitioner's case is simply not justified. In the present case, the Respondents have not been excluded from

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[1] Steele v. Louisville and Nashville R. R. Company, 323 U.S. 192, 195 (1944).

membership or participation in the union or its collective bargaining process. Quite to the contrary of the situation in *Steele* upon which the Fourth Circuit opinion relies, the Respondents in the present case stipulated to the Fourth Circuit that:

> Plaintiff makes no contention in this action that since July 2, 1965, black members of the local had been denied an opportunity to nominate and vote for principal officers of the local or that black members of the local have been denied the opportunity to nominate and vote for committee men to serve on the committee charged with receiving and processing the grievances of the members; or that members of the local have been denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local. [2]

Thus, Respondents have not been excluded in any way from exercising their rights and expressing their opinions in officer elections, through grievance procedures, or at general union meetings.

The Fourth Circuit further cites *Robinson v. Lorillard Corporation,* 444 F. 2d 791, 792 (4th Cir. 1971) in favor of the proposition that a union and/or employer can not bargain away the right to fair employment. Petitioner asserts that it did not bargain away the rights of the Respondents and the class they represent. Quite to the contrary, Petitioner, as the recognized bargaining representative, did actually work and negotiate as a fair and equitable representative of all its workers. The agreements which Petitioner negotiated were presented to the membership

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[2]Stipulation (m) page 340 of joint Appendix.

as a whole, Respondents included, and the membership *unanimously* voted to adopt these agreements. Respondents confirmed these actions in the stipulations contained in the joint Appendix sent to the Court of Appeals for the Fourth Circuit. That stipulation was as follows:

> The collective bargaining agreements executed January 26, 1968, to be effective January 15, 1968, with respect to both seasonal and regular employees, were unanimously adopted by vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreements. [3]

When the membership unanimously approved the bargaining agreements, it can hardly be said that Petitioner failed to represent and protect the best interest of the minority employees. In *Thornton v. East Texas Motor Freight*, 497 F. 2d 416, 425 (6th Cir. 1974), the Court makes this finding:

> None of the plaintiffs ever filed a grievance against the company on account of its no-transfer rule, nor did the plaintiffs or any union member ever request the union to process a grievance against the company. This would indicate rather clearly that the union members, including the plaintiffs, were well satisfied with the collective bargaining agreements.
>
> Under these circumstances, the union could not be held liable for failure to perform duties under the agreement, such as the duty to represent fairly its members.

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[3] Stipulation (r) page 340 of joint Appendix.

As further evidence of the incorrectness of the Fourth Circuit's ruling which requires the Petitioner to pay back pay compensation, Petitioner had no power or authority to control the selection of foremen and assistant foremen, and yet the back pay assessment for individuals denied a promotion which Petitioner has been ordered to pay might well include these positions as the order now stands. The Respondents actually stipulated that:

> (p) The selection and employment of foremen and assistant foremen is the exclusive right and responsibility of the company.

It would seem manifestly unjust that Petitioner should be held responsible for circumstances involving supervisory positions when it had neither the right nor the power to appreciably effect any decisions in this regard.

CONCLUSION

The holding below, if allowed to stand, would undoubtedly subvert the credibility of validly elected union negotiators and lay bargaining agreements that were fairly and correctly ratified by union memberships open to needless and unjustified attacks. Also, if allowed to stand, the decision below would place a severely punitive financial burden on an organization that neither deserves such a burden nor could it successfully withstand its implementation. For the foregoing reasons, this Petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Petition has been served upon counsel for the Respondents and counsel for the American Tobacco Company by depositing three (3) copies of said Petition in the United States mail, postage prepaid, and addressed to each of the following:

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Counsel for Petitioner

This ____ day of January, 1976.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

EDGAR RUSSELL, FREDERICK D. BROADNAX, ALVIS MOTLEY, JR., JAMES R. VAUGHN, LAWRENCE PRICE, JR., GLEN A. LEE, HAYWOOD GILLIAM and JAMES R. KAYLOR,

Plaintiffs

vs.

THE AMERICAN TOBACCO COMPANY and LOCAL 192, TOBACCO WORKERS' INTERNATIONAL UNION, an affiliate of AFL-CIO,

Defendants

NO. C-2-G-68

MEMORANDUM OPINION

GORDON, Chief Judge

This action was instituted pursuant to the provisions of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. The purpose of the action is to enjoin the defendants from alleged violation of the Act as well as to secure certain affirmative relief for the plaintiffs, and their class, as a result of prior alleged violations of the Act.

Messrs. Edgar Russell, Frederick Broadnax, Alvis Motley, Jr., James R. Vaughn, Lawrence Price, Jr., Glen A. Lee, Haywood Gilliam and James R. Kaylor are Negro citizens of the United States and residents of Reidsville, North Carolina. Messrs. Edgar Russell, Frederick Broadnax, Alvis Motley, Jr., James R. Vaughn, Lawrence Price and Glen A. Lee are employed by the defendant The American Tobacco Company (Company) at its Reidsville Branch in Reidsville, North Carolina. Messrs. Haywood Gilliam and James R. Kaylor are employed by the defendant Company at its Rockingham County Leaf Operation. All are members in good standing of defendant Local Union 192, Tobacco Workers' International Union, AFL-CIO.

Defendant Company is a corporation organized and existing under the laws of the State of New Jersey. The Company operates facilities for the handling and processing of leaf tobacco and the manufacturing of cigarettes in the City of Reidsville and in Rockingham County, North Carolina. The Company is an employer in an industry affecting commerce within the meaning of Section 701 (b) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(b).

The defendant Local 192, Tobacco Workers' International Union, AFL-CIO (Local) is a labor organization representing hourly paid employees of the Company in dealing and negotiating with the Company concerning terms, conditions, and privileges of employment of employees of the Company. The Local is a labor organization within the meaning of Section 701 (d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(d).

The Company operates a plant in Reidsville, North Carolina, and one in Rockingham County, North Carolina, at which

plants it conducts two major operations. More particularly, these are:

(a) The Reidsville branch of The American Tobacco Company (Branch) which receives tobacco from the Leaf Department, blends, processes and manufactures it in its filter and non-filter cigarettes for sale to the general public.

(b) The Reidsville Leaf Department of The American Tobacco Company located outside the corporate limits of the City of Reidsville but within Rockingham County (Leaf), which handles green leaf tobacco, such as burley, bright, Maryland, etc., processes and stores it until needed in Branch. Leaf also handles Turkish tobacco.

The departments or areas of employment utilized by the Company in its Branch operations are:

(a) Fabrication: Where cigarettes are made and packed, filters for cigarettes are made and where cigarettes are stored. The shipping and receiving operations are classified under fabrication; and

(b) Pre-fabrication: Where tobacco is received, conditioned, blended, cut and dried until needed in Fabrication.

The departments or areas of employment utilized by the Company in its Leaf operations are:

(a) Stemming: Where green leaf tobacco is first received, processed and handled;

(b) Storage: Where tobacco is stored until needed;

(c) Blending: Where tobacco is initially blended according to the brand of cigarettes to be produced; and

(d) Turkish: Which handles its special type of tobacco.

Employees in the Leaf department are classified as either regular employees or seasonal employees. Regular employees are employed on a year round basis. Seasonal employees are em-

ployed on a seasonal or temporary basis, usually from July to January of the following year.

Craft jobs such as electrician, machinist, tinsmith, welder, etc., are jobs classified in Fabrication although employees in these categories might perform duties in Fabrication and Prefabrication.

JURISDICTION

By order filed January 20, 1971, motions to dismiss filed by the defendants on the ground that the action was not timely instituted, as well as upon the ground that there was a variance between the allegations contained in the complaint and the charges filed by the plaintiffs with the Equal Employment Opportunity Commission (EEOC or Commission), were denied. A complete recapitulation of that order at this point would serve no purpose. However, suffice it to say that although it is important that the parties defendant be named in the charge lodged with the EEOC, Mickel v. S. C. State Employment Service, 377 F. 2d 239 (4th Cir. 1967), cert. denied, 389 U. S. 877, 88 S. Ct. 177, 19 L. Ed. 2d-166 (1967), and that grievances be set out so that EEOC investigators can ascertain their substance, the specificity associated with legal expertise is unnecessary. When the charge provides a general notice of the situation, a subsequent court action may include those issues which grow out of or are reasonably related to the Commission's investigation. Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 898 (D. Me. 1970); Younger v. Glamorgan Pipe and Foundry Co., 310 F. Supp. 195 (W.D. Va. 1969); Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D.N.C. 1969).

The gist of plaintiff Russell's letter to the EEOC was that for some time, allegedly, the Company had discriminated by reason of race in the promotion and transfer of black employees, specifically in two departments and that Local 192 had acquiesced in this conduct. This notice is sufficient to encompass the issues raised by the evidence.

In its earlier order, the Court reaffirmed, as it does here, the interpretation of the Civil Rights Act of 1964 which requires that suit be brought within thirty days of receiving the EEOC cause letter. Goodman v. City Products Corp., Ben Franklin Division, 425 F. 2d 702 (6th Cir. 1970). As stated in the earlier order, although the others might be precluded from maintaining individual actions by reason of the time limitation, they are included in the class of black employees of the Company, represented by the plaintiffs, James Kaylor, Edgar Russell, and Haywood Gilliam. Russell as an employee of the Branch operation has standing to represent similarly situated persons, while Kaylor and Gilliam, as employees of the Leaf operation of the Company have standing to represent other persons similarly situated.

Russell's letter of July 26, 1967, to the EEOC specifically charged an acquiescence by Local 192 in the discrimination allegedly committed by the Company. Russell, as a member in good standing of Local 192, has standing in this action to represent the class of all other blacks who are members of Local 192.

Local 192 relies originally on the contention that the charging letter not being under oath by Russell, jurisdiction has never been established for the EEOC to act or for this Court to subsequently hear this action. The statute conferring jurisdiction, 42 U.S.C.A. § 2000-e 5(a), does contain the words, "Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . ." The defendant Local 192 relies heavily on the words, "under oath," contending they are jurisdictional in nature. However, these words have been held to have an administrative meaning. "When the statute is thus considered, it is clear that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute." Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359 (7th Cir. 1968). Verification of the statement is required by the EEOC for its protection, not for the protection of the Court.

"If the Commission undertakes to process a charge which is not 'under oath', we perceive no reason why the district court should not treat the omission of the oath as a permissive waiver by the Commission. To deny relief under these circumstances would be a meaningless triumph of form over substance." Choate, supra, at 360.

The Commission's decision to act on and process an unsigned letter alleging discrimination constitutes a waiver of the "under oath" verification requirement. McGrif v. A. O. Smith Corporation, 51 F.R.D. 479 (D.S.C. 1971).

In the same jurisdictional vein, Local 192 maintains that a failure by the EEOC to serve a copy of the charge, tendered by the plaintiff Russell, on Local 192 destroys the viability of this action. The Local cites Long v. Georgia Kraft Co., et al, 1 FEP Cases 719 (NDGA. 1969) for the proposition that while it may be conceded that actual conciliation by the EEOC need not be conducted, the opportunity for conciliation has been held to be essential. The Local urges the view that it never received statutory notice of the charge filed by Edgar Russell, and was therefore unprepared to defend itself against any such charge.

This jurisdictional defense is almost entirely lacking in substance. Local 192 has plucked one isolated case from a veritable thicket of contradictory cases to bolster its assertion. Elucidation is found in Holliday v. Railway Express Company, Inc., 306 F. Supp. 898, 901 (N.D. Ga. 1969).

"Third, the failure of the Commission to supply respondents with a copy of the charges should not be a fatal bar to private action in federal court. Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D.La. 1967), rev'd. on other grounds, . . . International Brotherhood of Electrical Workers Local Union No. 5 v. United States EEOC, 398 F. 2d 248 (3d Cir. 1968), cert. denied, 393 U.S. 1021, 89 S. Ct. 628, 21 L. Ed. 2d 565, reversing 283 F. Supp. 769 (W.D. Pa. 1967). One judge in this district has held to the contrary. Long v. Georgia Kraft Co., 71 LRRM 2016 (N.D. Ga.

1969); Long v. Georgia Kraft Co., 71 LRRM 2018 (N.D.Ga. 1969), in two holdings with which this Court must respectfully disagree. There are but a few jurisdictional prerequisites to suit, among which are a charge properly filed with the Commission against the parties named in the civil suit, and receipt by the complainant of statutory notice that the Commission has been unable to secure voluntary compliance through conciliation, followed by a filing within 30 days. Mickel v. South Carolina State Employment Service, 377 F. 2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877, 88 S. Ct. 177, 19 L. Ed. 2d 166; . . . Choate v. Caterpillar Tractor Co., 402 F. 2d 357 (7th Cir. 1968)."

It is found that the "opportunity to conciliate," for which Local 192 pleads, is the opportunity for the EEOC to exercise its powers. Penalizing the plaintiff because of a failure by the EEOC to exercise its statutory duty is legally unacceptable. Tippett v. Liggett & Myers Tobacco Company, 316 F. Supp. 292 (M.D.N.C. 1970); Younger v. Glamorgan Pipe and Foundry Company, supra.; Choate v. Caterpillar Tractor Co., supra.

It is concluded as a matter of law that even if there were a failure by the EEOC in the instant case to present Local 192 with a copy of the charge filed by the plaintiff, Edgar Russell, such fact has no bearing on the facts establishing jurisdiction in this case.

Further, Local 192 contends that since the collective bargaining agreement was negotiated by a tripartite union board made up of the Reidsville, Durham, North Carolina, and Richmond, Virginia locals, the other locals are indispensable parties. This issue was decided adversely to the Union's contentions on January 20, 1971, at which time this Court granted permission to the other locals to intervene if they felt their rights were being threatened. This case in its present form does not suffer from a nonjoinder of parties defendant.

CLASS OF AFFECTED EMPLOYEES

By Order entered April 10, 1969, the Court held this to be

a proper class action in the following language:

> "IT IS, THEREFORE, ORDERED that the plaintiffs may prosecute this proceeding as a class action pursuant to Rule 23(a) (b) (2) of the Federal Rules of Civil Procedure. Since this proceeding falls within the provisions of Rule 23 (b) (2), no notice to members of the class need be given at this time.
>
> "The Court further finds and hereby orders that the class here involved are all Negroes who are employed by the defendant company at its Reidsville plant and who might subsequently be employed by the defendant company at its Reidsville plant and who are affected by any racially discriminatory policies or practices of the defendant company and defendant union at the Reidsville plant, should the Court find any such practices in the defendant company's plant in Reidsville, North Carolina. The Court further finds that the class also consists of Negroes who have not applied at the defendant's Reidsville plant because of any racially discriminatory practices, if the Court finds any such practices to exist.
>
> "This ruling is conditional and may be amended, modified or altered at any time prior to final determination of this cause on the merits."

Pursuant to this conditional Order, and the findings made herein, the class applicability is modified to some extent.

The defendant Company maintains separate lines of seniority in its Branch and in its Leaf Department. However, these two operations are completely separate and distinct operations. In view of the physical distance between the two facilities, the difference in the types of work done at the two facilities, and the efficiencies derived by keeping the two operations separate and distinct, it is found that the two lines of seniority should

not be merged and that there is no justification in law or in fact for merging the two lines of seniority.

Having found that there is no basis in fact or law for merging the lines of seniority at Branch and Leaf, it is found that there has been no discriminatory hiring at Leaf. Because of the equality of opportunity to be hired either at Branch or Leaf, blacks who work at Leaf would be excluded from the class, except for the finding that promotion to supervisory levels at Leaf has been administered in a discriminatory fashion. The class shall include those blacks at Leaf who have been discriminated against because of the supervisory selection process. In so doing, any contention that Branch and Leaf are nothing more than two departments in the American Tobacco Company is specifically rejected.

The class of affected employees at Branch is defined as all black persons employed by the American Tobacco Company at Branch prior to January 1, 1955, and who continued to be so employed between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to a junior (in point of employment date seniority) white employee because of the criterion of "qualifications" used in selecting persons for promotion between 1963 and May 27, 1968.

There was no hiring between 1955 and 1965 at Branch. Black persons hired since 1865 are not affected by the use of the "qualifications" criterion because they are junior to all the other employees, white and black, and could not have advanced even if the Company had promoted on straight employment date seniority.

The class must also include black machine operators who were bumped back from their jobs because they had not reached the prevailing rate after the Company made the thirty-five day prevailing rate proposal to representatives of the three eastern locals in October, 1968. This segment of the class will be limited to those machine operators who had worked on the machines thirty-five days before being pushed back.

SENIORITY SYSTEM

Prior to October, 1963, hourly paid employees of the Company were represented by racially segregated local unions. The defendant Local was the bargaining agent for white employees in jobs under its jurisdiction in Leaf and Branch. Jobs in Fabrication were filled predominantly by whites and thus came under the jurisdiction of the defendant Local; jobs in Pre-fabrication were filled predominantly by blacks.

At all times material to this action all of the Company's regular employees, Leaf and Branch, were covered by a single collective bargaining agreement and all of the Company's seasonal employees were covered under a separate labor agreement.

In the late 1950's the Company, due to modernization and automation, eliminated approximately thirty jobs in Pre-fabrication and the black employees displaced were transferred to jobs previously held by white employees in Fabrication. This movement was temporary, and in accordance with an oral agreement between the Company and the two segregated locals, the blacks who had been transferred to Fabrication were transferred back to Pre-fabrication.

In October, 1963, the two previously segregated locals merged into the defendant Local 192. Prior to the merger of the locals, promotions were made on the basis of jobs and departmental seniority; employees in Fabrication could only exercise seniority in jobs in Fabrication; jobs in Fabrication constituted one line of seniority and jobs in Pre-fabrication constituted a separate line of seniority.

More specifically, prior to 1963, the Company used a combination of departmental seniority and plant seniority. Departmental seniority was used to determine promotions. Plant seniority was used to govern lay-off and recall. The 1962 Agreement provided only that "all promotions and demotions shall be made in accordance with seniority provided that, in the opinion of management, there is no question as to the qualifications and efficiency of the employee concerned." After the

merger of the locals, the defendants established a single line of seniority for Branch, and promotions made within the Branch were made on the basis of seniority and qualifications. This was done in accordance with the 1962 collective bargaining agreement as amended by the agreement dated March 10, 1964. Until late 1966, the selection of personnel to be promoted was accomplished by means of a canvass among the employees from senior to junior until the job or jobs were filled.

Between 1966 and May 27, 1968, permanent promotions within the Branch were made on the basis of seniority and qualifications, but the availability of jobs or job openings was posted on the bulletin boards within the Branch and employees desiring those jobs signed these postings rather than being canvassed.

Beginning May 27, 1968, promotions within the Branch were made on the basis of seniority alone and the criterion of "qualifications" was not used. Job availability was posted on the bulletin boards for signing by persons desiring such jobs.

In May, 1964, approximately ninety employees retired under the Company's early retirement plan. Most, if not all, of these employees were white employees who held jobs of making or packing machine operator. As a result of these retirements, a number of vacancies in pipeline jobs (which have to be manned to produce any cigarettes at all) were created. A number of employees, most if not all of whom were white, were pushed back to lower paying jobs in the pipeline. These employees were given a special classification, sometimes referred to as "Group II" employees. These employees, by virtue of an oral agreement between the Company and the Union, were given the right to return to their former jobs as openings occurred, notwithstanding the fact that transfer back to their former jobs might involve promoting them over black employees having greater plant seniority. All of the Group II employees were ultimately promoted back to his or her old job, a higher paying job, or retired or have declined the offer to return. Of the fifty-

one employees in Group II identifiable by the Company, twenty-seven were promoted back to his or her old job or a higher paying job after the effective date of the 1964 Civil Rights Act, July 2, 1965.

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971), roundly condemned any seniority system which, though neutral on its face, serves to perpetuate the effects of past racial discrimination in hiring. A seniority system must be bona fide.

> "(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(h).

The business purpose to be served in the instant case was that personnel who had previously served on making and packing machines would not require training. The Company characterized the pushback as temporary by promising those affected employees that they would return to their jobs in Fabrication as soon as possible. The predominantly white Fabrication side became to because of racially discriminatory hiring which occurred before the 1964 Civil Rights Act. When the character of the work force had to be changed in 1964 and 1965, the proper course of action would have been a permanent pushback, with the most senior employees returning to the Fabrication jobs when they again opened. This would, of course, have disappointed the hopes of those white workers who had attained the more advantageous Fabrication jobs through discriminatory pre-Act hiring. The seniority system cannot be held bona fide

simply because it would have kept the morale, and therefore, efficiency, of at least the white employees at a high level.

> "However, Title VII guarantees that all employees are entitled to the same expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity." Robinson, supra, at 800.

The use of "seniority and qualifications" to return white employees with less seniority to preferred jobs in Branch over more senior blacks, did not constitute a "bona fide" seniority system.

The March 10, 1964, amendment to the 1962 collective bargaining agreement, which has been previously referred to, provided that promotions and demotions would be made without regard to race, color, creed or national origin. The 1962 agreement was further modified by letters of understanding on October 27, 1964, which restated the amendment adopted on March 10, 1964, except that the October 27 amendment added "except as otherwise agreed to by the Company and the appropriate Union local or locals." The effect of the letters of understanding was purportedly to disestablish departmental seniority in Branch, and to establish a single line of seniority for Leaf.

Several black employees were promoted to positions in Fabrication between 1965 and 1968 as a result of the letters of understanding executed on October 27, 1964. However, a number of black employees were placed back in their old positions during this time because they had not reached the prevailing rate, the top pay for the position. Historically the rate progression required twelve months to reach the prevailing rate.

During the course of a meeting between the Company and

Local in March, 1968, the Company proposed to modify the prevailing rate and qualification schedule for the positions, among others, of maker, packer, container packer and filter rod machine. The Company's proposal provided that if an employee had worked in a job classification for a period of thirty-five working days, he could receive the prevailing rate for the position as well as exercise his plant seniority for both temporary and permanent cut backs. The Company's position in proposing the thirty-five day provision was that the Company would be able to determine within this period whether an employee had the ability to learn the job. The Local opposed the thirty-five day proposal, apparently because earlier employees had to work twelve months to reach prevailing rate. The Union, which is predominantly white, found itself in the position of protecting its white members who felt that a reduction in the time to reach prevailing rate unduly burdened them.

Generally stated, there may be instances in which discriminatory policies, i. e., those that prefer one choice over another, may not be illegal, but only in the case of a legitimate business necessity. "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose." Local 189, United Papermakers and Paperworkers, AFL-CIO v. U.S., 416 F. 2d 980, 989 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970).

The evidence has indicated that the thirty-five days to reach prevailing rate as suggested by the Company is adequate for the Company to make a determination of suitability for the job. The decision to reduce prevailing rate period from twelve months to six months instead of thirty-five days resulted from Union pressure.

> "Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment prac-

tice. The rights assured by Title VII are not rights which can be bargained away – either by a union, by an employer, or by both acting in concert." Robinson v. Lorillard Corp., supra, at 799.

There is not a sufficient showing of a business necessity to justify the discrimination which resulted from reducing the period to reach prevailing rate from twelve months to six months, instead of thirty-five days as proposed by the Company.

SCREEN TESTING

Plaintiffs contend that the use of screen tests for selections to fill craft positions is discriminatory. Before the screen tests were compiled and their use was instituted, employees in the craft positions, i. e., Schmermund Box adjusters, air conditioning operators, machinists, electrical technicians, and millwrights were hired from outside the Company. Persons trained in the requisite crafts were hired when positions became open.

According to the testimony of Mr. William G. Springs, Chief Engineer, Construction and Maintenance, this practice changed around 1956 when the Branch operation of the Company bought Accuray machines to measure the density of cigarettes through electronic use of nuclear materials. Mr. Springs interviewed and questioned prospective Accuray technicians from among the then presently employed workers at Branch. The positions were filled satisfactorily through use of this "in-house" qualification testing program. Thus was born the screen testing program, which plaintiffs contend constitutes a continuing discriminatory practice.

Section 703(h) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(h) provides as follows:

"[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed,

intended or used to discriminate because of race, color, religion, sex or national origin."

The plaintiffs urge upon the Court that the decision in Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) necessitates a ruling in the instant case that the defendant Company's screen tests are unlawful in their application to black employees. Guidance in delineating the perimeters of Griggs, supra, is found in the words of Mr. Chief Justice Burger, who delivered the opinion of the Court:

> "We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." Griggs, supra, at 426.

Griggs is doubly distinguishable from the instant case in that this Court is not now concerned with the requirement of a high school education or the passing of a general intelligence test, nor have the plaintiffs shown that the present requirements operate to disqualify Negroes at a substantially higher rate than whites.

The figures relevant to the craft positions at the time of the taking of depositions in 1969 reveal that of fifty-nine craft positions, none were held by Negroes. The Company cannot and does not contest these raw statistics. Theirs is not so to do. The burden of proof rests squarely with the plaintiff to show some discriminatory effect from a test requirement before the

Court need consider the issue of job relatedness. Broussard v. Schlumberger Well Services, 315 F. Supp. 506, 512 (S.D. Texas 1970) held the following:

> "Plaintiffs argue for what, in effect, amounts to a per se rule that the use of a test that has not been professionally validated as to job relatedness is a discriminatory practice . . . . However, in the absence of a showing of a discriminatory effect of the testing requirement upon Negroes as a class any further discussion of job relatedness would be fruitless."

United States v. H. K. Porter Company, 296 F. Supp. 40, 76, 77 (N.D. Ala. 1968) held:

> "For a court to find racial discrimination in the use of aptitude tests which have not been validated, there should be at least some evidence that the use of an aptitude test which has not been validated has resulted in discrimination and not merely the abstract proposition that test validation is desirable."

The plaintiffs contend that there can be no question that the tests used by the Company operate to exclude Negroes in the sense referred to in Griggs. Evidence substantiating such an argument would be of far greater import than the bald assertion.

Discriminatory effect is the whole cornerstone to any decision concerning employment practices such as testing requirements. Discussions of business necessity, intent and job relatedness are largely academic in the absence of discriminatory effect.

The plaintiff has produced only raw figures for this Court. There has been no showing of the percentage of blacks or whites who passed or failed the test. There has been no showing that as a result of the institution of written examinations as a condition of job transfers that blacks were excluded from em-

ployment opportunities in a disproportionate number of cases over whites. There has been no definitive showing of proportions whatsoever. The burden of proof does not shift to the Company to prove business necessity or job relatedness.

Even so, it is found that the screen tests used by the Company as conditions to transfer to craft positions are job related and valid.

The plaintiffs contend that the EEOC Guidelines interpreting s 703(h) of the 1964 Civil Rights Act are to be followed verbatim by this Court. For support, Griggs v. Duke Power Co., supra, at 433-434 is cited as follows:

> "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting s 703(h) to permit only the use of job related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

Griggs, supra, does command that the EEOC Guidelines be treated deferentially, but the perimeters of this deference are limited by a close reading of Griggs, to the requirement that tests be job related. The geometric progression of reasoning by which the plaintiff insists that the tests must have been professionally developed and validated is laudable, if not logical. United States v. H. K. Porter Company, supra, at 76, refutes the plaintiffs' contention:

> "If this statute [703(h)] is to be construed as requiring test validation, the important aspect of the matter is not to be able to say that it has been conducted by a professional psychologist but to be satisfied that it has been conducted fairly and properly. Moreover, the Court received the firm impression from hearing the witnesses testify on the subject that because familiarity with the duties of jobs and with the job performance of employees are essential elements in a test validation, a layman having this knowledge and some experience in testing would be qualified to conduct a test validation."

The plaintiff infers that only a trained psychologist or industrial tester can validate a testing program. This might be so if the various types of validity are given their tightest textbook interpretation. However, content validity means nothing more than "a piece of the job." Mr. William G. Springs, who prepared the tests, is intimately familiar with the requirements which each job in the crafts places on its holder. As Chief Engineer, Construction and Maintenance, he is directly responsible for the training and production of employees in the crafts. He knows what is required of an employee and what is required of the job. From careful scrutinization of the tests prepared by Mr. Springs, the Court is convinced that the tests are an accurate measure of the skills required for the job to which each test is oriented. The Court finds that the tests are not in the nature of general intelligence tests, but rather are sharply oriented to the job being tested for. They are job related. The use of screen tests by the Company has not been a discriminatory practice.

This Court finds from the evidence that the use in the past of the screen tests are not discriminatory. Nevertheless, to prevent future discrimination, the Court enjoins the future use of screen testing by the Company or the use of present lists compiled from previous administrations of the tests. To be used henceforth, such tests must be validated in accordance with the requirements of the "Guidelines of Employee Selection Procedures" published by the United States Equal Employment Opportunity Commission.

Screen testing is a highly complex and technical matter with its attendant administrative intricacies. In this case, there is no question that the tests employed are job related. However, exercising an abundance of caution to assure fairness, the Court adopts the EEOC Guidelines on validation for future validation of tests by the Company. United States v. Jacksonville Terminal Co., 451 F. 2d 418, 456 (5th Cir. 1971), held, "Certainly the safest validation method is that which conforms with the

EEOC Guidelines 'expressing the will of Congress.' "

SUPERVISORY PERSONNEL

The Company has the sole authority for the selection of persons for supervisory positions.

The policy of the Company concerning the hiring of supervisory personnel for Branch employment is to hire by qualifications. The Company obtains its supervisory personnel for the Branch in two different ways. Some employees are promoted from hourly rated jobs to supervisory positions. Other supervisory personnel are hired from without the Company. The Company canvasses colleges in search of suitable trainees for supervisory positions.

There are no written qualifications for foremen employed by the Branch, and persons for such positions are selected by management based upon an applicant's ability to learn the job, his age, his knowledge of the operation, his ability to get along with people, and sufficient educational background to enable him to keep records.

As of January 29, 1968, there were fifty-three persons employed in supervisory positions in Branch. Of these forty-nine were white (thirty-one foremen, eighteen assistant foremen); four Negroes occupied the position of assistant foreman and they were assigned to Pre-fabrication.

The Leaf Department hires its supervisory personnel by one of two methods. Management of the Leaf Department either promotes an hourly paid employee through the ranks to a supervisory position, or a person is hired from without the Company for a supervisory job after interviews and from applications. The last person hired from without the Company as the result of an application for a supervisory position was in 1965.

The Leaf Department employs both black and white supervisors, and these supervisors have occasion to supervise the work of both black and white employees. The Leaf Department's first black supervisor was promoted to that position in 1957,

and he has since retired.

As of January 29, 1968, there were 197 black employees in Leaf (73 regular, 124 seasonal), of which three occupied the position of assistant foreman. There were thirty-six white employees in Leaf (33 regular, 3 seasonal), of which twenty-seven occupied the position of foreman (18) or assistant foreman (9). Since January, 1969, one black assistant foreman has been promoted to the position of foreman.

Plaintiffs contend that the statistical evidence in this case establishes that the Company has engaged in racial discrimination in the hiring and promotion of supervisory personnel. The Company maintains that, statistical evidence notwithstanding, the plaintiffs have failed to show that in any way the Company has discriminated against blacks in the selection of supervisory personnel.

Plaintiffs rely heavily on Brown v. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972), and Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972). Brown, supra, reiterates the present importance of statistical evidence in establishing patterns of discrimination. In Brown, the defendant's lack of objective standards for hiring, pay increases within job classifications, and for promotion from one job to another lost any innocuousness in the face of statistics indicating that race was the only identifiable factor that could explain the disparity between employees. "Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted." Brown, supra, at 1382.

In Rowe, supra, the lack of any written objective criteria to aid supervisors in their recommendations of hourly employees to salaried positions coupled with the absence of safeguards to prevent discriminatory action was cited to the court. There was a holding of discrimination by the court after it considered the above factors in the light of discriminatory statistics. Relief was ordered by the court.

In the instant case, the figures from the Leaf Operation can

hardly be surpassed. Of thirty-six white employees in Leaf (33 regular, 3 seasonal), twenty-seven are foremen. If all the foremen are regular employees, and there is no indication to the contrary, then only six regular white employees in Leaf are not supervisors. 81.8% of all regular whites are supervisors. In considering the same figures for blacks, there are three supervisors of 197 black employees (73 regular, 124 seasonal). Again, discounting the seasonal employees, this leaves 3 out of 73 blacks as supervisors. Even figuring it out to one decimal point, only 4.1% of the regular blacks are supervisors. These figures would chafe the conscience of the Court, even if objective criteria were fully in use, which has not been demonstrated. The lack of objective guidelines and written criteria are some indicia of discrimination.

These figures were applicable through January 29, 1968, when depositions were taken. The Company's memorandum states that at the time of trial, there were two black supervisors and seventeen white. These figures are indeed not as damning if taken to mean that 2/19 or approximately 11% of all supervisors in Leaf are black. However, the number of black and white supervisors must be considered in light of the number of employees of the respective race.

It is, therefore, held that the Company's Leaf operation has discriminated against blacks in promotion to supervisory positions in violation of the Civil Rights Act of 1964 and a suitable injunction should issue. Formulation of objective criteria for promotion to supervisory positions is hereby mandated.

In the Branch operation, the statistical pattern is different. As of January 29, 1968, Branch had 1,353 whites and 228 blacks. There were 49 white supervisors and 4 black supervisors. Blacks made up approximately 14% of the work force and approximately 8% of the supervisory force. These figures do not mandate a finding of discrimination in promotion to supervisory positions in Branch. Here again though, objective criteria for promotion would be desirable.

FACILITIES

The plaintiffs produced no evidence that there is any segregation by race in respect to toilets, locker rooms, medical facilities, cafeterias and other facilities. On the contrary, there was affirmative evidence that facilities have not been segregated on the basis of race since well before the effective date of the Act. The toilet facilities were integrated in 1961. The cafeteria and medical facilities were integrated in 1962.

PAY AND CLASSIFICATIONS

The Company does not and has not, since the effective date of the Act, classified certain jobs as "skilled," others as "semi-skilled," and others as "unskilled" insofar as pay and assignments are concerned.

All employees of the Company are paid on the basis of the job classification under which their work is performed in accordance with the rate schedules negotiated between the Company and the Union and there is no distinction in the pay rates or the amount actually paid by reason of the race or color of any employee. Blacks and whites are paid the same amount for the same work.

EDGAR RUSSELL

An intensive examination of the voluminous evidence compiled at trial pertaining to the many personal complaints of Mr. Russell reveals that most of the complaints are more fiction than truth. A harmonious work relationship with one so easily offended would indeed be difficult. The allegations of racially motivated personal harrassment is not established by the record.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The defendant, The American Tobacco Company, is an

employer in an industry affecting commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(b).

3. Local 192 Tobacco Workers International Union AFL-CIO is a labor organization engaged in an industry affecting commerce within the meaning of Sections 701(d), (e), of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(d), (e).

4. The plaintiffs have compiled with the procedural requirements of Sections 706(a), (d), and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d), (e).

5. This action is properly maintained as a class action under Rule 23(a) (b) (2) of the Federal Rules of Civil Procedure. The class is as hereinbefore defined.

6. The use of the criteria "seniority and qualifications" instead of straight employment date seniority by the defendants until May 27, 1968, in promotions and transfers in the Branch operation of the American Tobacco Company in Reidsville, North Carolina, constituted discrimination against members of the affected class and an unlawful employment practice in violation of Sections 703(a) and (c) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (c).

7. The practice or policy of the defendants in using or acquiescing in the use of a six-months period to reach prevailing rate instead of the thirty-five day period first proposed by the defendant American Tobacco Company in 1968, constitutes discrimination against members of the affected class and an unlawful employment practice in violation of Sections 703(a) and (c) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and (c).

8. The absence of objective criteria to aid in the selection of supervisory personnel in the Leaf operation of American Tobacco Company in Reidsville, North Carolina, has constituted a deprivation of employment opportunities and an unlawful employment practice in violation of Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

9. The use of screen testing by the American Tobacco Company in its Branch operation has constituted neither discrimination nor an unlawful employment practice and the use of such testing has comported with Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). From the time an order is entered, use of screen testing by American Tobacco Company in Reidsville, North Carolina, or of any lists of successful test applicants will constitute discrimination and an unlawful employment practice in violation of 42 U.S.C. § 2000e-2(a), unless and until such time as the screen tests to be used have been professionally validated in accordance with the requirements of the "Guidelines of Employee Selection Procedures" published by the United States Equal Employment Opportunity Commission.

10. Defendants have intentionally engaged in the unlawful employment practices described in Conclusions 6, 7, and 8 above and are intentionally engaging in the unlawful employment practices described in Conclusions 7 and 8, within the meaning of Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

11. None of the unlawful employment practices in Conclusions 6, 7, and 8 above resulted from a bona fide seniority or merit system within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

12. This Court is authorized by Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) to enjoin the discriminatory practices described herein and to order other appropriate affirmative relief in the nature of back pay.

An Order will be entered in accordance with these Findings.

Consistent with these Findings, counsel for the plaintiffs will prepare and present to this Court an appropriate order which shall provide for the implementation in the Reidsville, North Carolina, plant of the defendant Company the proposal by the Company during the 1968 negotiations for a thirty-five day period to reach prevailing rate, where applicable, and in the Rockingham County, North Carolina, Leaf operation of the

Company, a system of objective criteria to aid in the selection and promotion of supervisory personnel.

Further, the order will provide that within thirty days after the order counsel for the plaintiffs will submit to the Court suggested methods by which back pay may be computed for each member of the affected class with special attention to instructions that should be given a special master should the Court decide to appoint a special master. The defendants shall have twenty days thereafter in which to file countersuggestions.

January 18, 1973

/s/ EUGENE A. GORDON
United States District Judge

Carmon J. Stuart, Clerk

Albert L. Vaughn, Deputy Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

EDGAR RUSSELL, FREDERICK D. BROADNAX, ALVIS MOTLEY, JR., JAMES R. VAUGHN, LAWRENCE PRICE, JR., GLEN A. LEE, HAYWOOD GILLIAM, and JAMES R. KAYLOR,

Plaintiffs

vs.

THE AMERICAN TOBACCO COMPANY and LOCAL 192, TOBACCO WORKERS' INTERNATIONAL UNION, an affiliate of AFL-CIO,

Defendants

NO. C-2-G-68

ORDER

This cause having come on for trial before the Court, sitting without a jury, in November, 1971, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been entered by the Court on January 18, 1973, it is ORDERED, ADJUDGED AND DECREED:

The defendants, The American Tobacco Company ("the Company") and Local 192, Tobacco Workers' International Union, AFL-CIO ("Local 192"), their officers, agents, employees and servants and all persons in active concert or participation with them are hereby permanently enjoined and restrained from discriminating against the affected class of black employees of the Company as herein described because of their race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. at the Company's facilities located in the City of Reidsville and Rockingham County, North Carolina.

1. The Affected Class.

   A. The affected class for purposes of this Order shall include:

   (i) All black persons employed by the defendant American Tobacco Company at Branch prior to January 1, 1955, and who continued to be so employed at anytime between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to a junior (in point of employment date seniority) white employee because of the criterion of "qualifications" used by the Company in selecting persons for promotions between October, 1963, and May 27, 1968;

   (ii) All black persons who had worked as machine operators for 35 or more days and who were bumped back from their jobs at anytime from October, 1968, to the present because they had not reached the prevailing rate; and

   (iii) All black persons at Leaf who have been discriminated against because of the Company's racially discriminatory supervisory selection process.

2. The Seniority System.

A. Branch.

(i) The defendants are enjoined from implementing, maintaining or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to, or has the effect of, discriminating against members of the affected class who are employed in the Branch operation of the Company, including the use of any criteria of "seniority and qualifications," insofar as such system governs promotions, layoffs and push-backs.

(ii) The defendants are hereby ordered to continue to implement and to continue permanently a system of plant seniority with respect to job assignments, promotions and push-backs of Branch employees in the affected class where the qualifications of competing employees are relatively equal.

(iii) Plant seniority as used herein is the length of service from the most recent date of permanent employment.

(iv) The injunction and prohibition contained herein shall not be deemed to proscribe the continuation by the Branch of the eight lines of progression now being used where stipulated prior experience is a prerequisite for certain jobs. That is to say, the following work rules have not been found to be discriminatory and the continuation of the following work rules is not prohibited:

(a) An employee must have reached the prevailing rate as a learner adjuster before he is eligible to bid for the job of adjuster.

(b) An employee must have reached the prevailing rate as an operator before he is eligible to bid for the job of learner adjuster.

(c) An employee must have reached the prevail-

ing rate as a catcher before he is eligible to bid for the job of examiner-making.

(d) An employee must have reached the prevailing rate as a line searcher before he is eligible to bid for the job of examiner-packing.

(e) An employee must have reached the prevailing rate as assistant adt dryer operator before he is eligible to bid for the job of adt dryer operator.

(f) An employee must have reached the prevailing rate as assistant textile dryer operator before he is eligible to bid for the job of textile dryer operator.

(g) An employee must have reached the prevailing rate as a making or packing adjuster before he is eligible to bid for the job of overhaul adjuster-making or packing.

(h) An employee must have reached the prevailing rate as either assistant adjuster or oiler before he is eligible to bid for the job of prefabrication adjuster.

The selection processes where the upgraded job is open only to an employee who has had some stipulated prior experience in some other job, as listed above, has not been found to be discriminatory, and such promotions are not to be considered within the perimeters of the injunction above set forth.

B. Leaf.

(i) All Claims by plaintiffs for relief regarding alleged racially discriminatory employment practices, including alleged discriminatory administration of the seniority system, in Leaf are denied.

(ii) The only relief granted to plaintiffs in connection with their allegations of racially discriminatory practices in Leaf is the relief granted herein with res-

pect to the selection of supervisory personnel in Leaf, and the employees in Leaf within the class adversely affected are defined above, in Paragraph 1.A. (iii).

3. The Thirty-Five Day Prevailing Rate Provision.

A. The defendants are hereby enjoined from implementing, maintaining, continuing or giving effect to or acquiescing in any policy or practice, whether pursuant to a collective bargaining agreement or otherwise, which requires Branch employees of the affected class to perform machine operator jobs for a period of six months before they reach the prevailing rate for that job and before they are entitled to utilize their plant seniority for all purposes for which seniority is used.

B. Any employee at the Branch who successfully bids or signs a post for an opening on automatic machinery (such as makers, packers, boxers, container packers, filter rod machine, etc.) and who qualifies for such job within thirty-five working days shall, at the end of thirty-five working days on the particular machine, immediately receive the top prevailing rate the job carries and the plant-wide seniority of that employee shall then become effective with respect to all cut backs, whether temporary or permanent, and any employee who has thus qualified on a job by successfully completing the thirty-five working days shall not be cut back (whether permanently or temporarily) except by plant-wide seniority.

4. Testing.

The Court has found from the evidence that the Company's use of certain screening tests for craft jobs are job related and do not have an adverse impact on the employment opportunities of black employees of the Company. However, the Court, in order to assure fairness to black employees in the future hereby orders the Company, from the time this Order is entered, to discontinue the use of any screening tests at its Reidsville, North Carolina operations, or of any lists of successful test applicants, unless and until such time as the screen tests

to be used have been professionally validated in accordance with the "Guidelines on Employee Selection Procedures," promulgated by the United States Equal Employment Opportunity Commission.

5. Supervisory Personnel.

A. The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against members of the affected class who are employees of the Leaf operations of the Company.

B. The Company is ordered to formulate objective criteria for promotion and to implement an affirmative action program for the selection of supervisory personnel in its Leaf operation which shall be designed to eliminate the racially disparate effect on affected class members in Leaf. The affirmative action program to be implemented shall consist of the Company taking the following action:

(i) The posting of notices on bulletin boards in conspicious places throughout Leaf announcing vacancies for supervisory positions.

(ii) The periodic posting on bulletin boards in conspicious places throughout Leaf of notices which shall contain information with respect to qualifications for consideration for promotion to supervisory positions.

(iii) In considering applicants from the affected class at Leaf for supervisory positions, management shall take into account the seniority standing of such applicant or applicants.

(iv) Management shall take into account punctuality, and regularity of attendance of any members of the class at Leaf who apply for a supervisory position.

(v) Management shall consider the ability of any affected class members at Leaf who apply for super-

visory positions to work in harmony with their co-workers.

(vi) The ability to write and the ability to follow written instructions, if they are requirements for supervisory positions, shall be specifically stated in all notices and shall be otherwise brought to the attention of members of the affected class at Leaf.

(vii) If any members of the affected class at Leaf apply for supervisory positions, management shall take into account the ability of those persons to reach production goals while serving in non-supervisory positions.

(viii) Management shall advise in writing all affected class members who have applied for supervisory positions and who have been rejected of the reasons of their disqualification.

C. The procedure outlined in Paragraph 5.B. above is in no way intended to be an exhaustive listing of non-racial, objective methods for the selection of supervisory personnel, and the Company is encouraged to utilize any other procedures for the selection of supervisory personnel in Leaf which are not designed to discriminate, or which do not have the effect of discriminating, against affected class members.

D. The Court has heretofore found that there has been no racial discrimination with respect to the selection of supervisory personnel in Branch and, accordingly, all claims by plaintiffs for relief in regard to alleged discriminatory practices at Branch in the selection of supervisory personnel are denied. However, the Court suggests that an affirmative action program similar to the one described in 5-B above for the selection of supervisory personnel in Branch would be desirable to avoid possible future discrimination against black persons.

6. Facilities.

The allegations of the plaintiffs relating to racially segregated employees' facilities are not supported by the evidence,

and the claims of plaintiffs for relief in this regard are denied.

7. Edgar Russell's Individual Claim.

All claims for relief by plaintiff Edgar Russell for alleged racially motivated personal harrassment by officials of the Company and the alleged failure of defendant Local 192 to process vigorously such grievances or to fairly represent him in dealing with the Company relating to his terms, conditions and privileges of employment are denied as the evidence does not support his allegations.

8. Pay and Classifications.

The Court has heretofore found that the Company has not, since the effective date of Title VII, classified certain jobs as "skilled" and others as "semi-skilled" insofar as pay and assignment are concerned; and the Court has found further that black and white employees are paid the same amount for the same work in accordance with the rate schedule negotiated between the Company and Local 192; therefore, all claims for relief with respect to these matters are denied.

9. Back Pay.

A. Black persons employed by the Branch prior to January 1, 1955, and who continued to be so employed between July 2, 1965, and May 27, 1968, and who were denied a promotion in preference to junior (in point of employment date seniority) white employees because of the criterion of "qualifications" used in selecting persons for promotion between October, 1963, when the white and black locals were merged, and May 27, 1968, shall be entitled to recover back pay from the defendants in an amount and for a period to be fixed by subsequent order of this Court.

B. The entitlement to back pay provided for above is based upon preferential promotion practices which favored junior whites over senior blacks, and shall not be construed so as to include those promotions made in which stipulated prior experience is a prerequisite for a particular job, as described in Paragraph 2.A. (iv), above, nor shall it be construed so as to

include promotions awarded to persons successfully taking a screen test for a craft job.

C. Black machine operators who, after October 25, 1968, were bumped back from their jobs because they had not reached the prevailing rate, shall be entitled to recover back pay from the defendants in an amount and for a period to be fixed by subsequent order of this Court, but the black machine operators entitled to back pay hereunder shall be limited to those black machine operators who had worked on their respective machines for thirty-five days prior to the time they were bumped back, and shall exclude any black machine operators who were bumped back prior to the time such operator(s) had worked on his or her respective machine for thirty-five days.

D. Within thirty days after the entry of this Order, counsel for plaintiffs shall submit to the Court suggested methods by which back pay may be computed for each person described above in Paragraphs A. and C. of this Paragraph 9, with special attention to instructions that should be given a special master should the Court decide to appoint a special master. The defendants shall have twenty days thereafter in which to file counter suggestions, giving special attention to the apportionment of any back pay recovered as between the defendants.

E. At the time of filing the information required in Paragraph D. of this Paragraph 9 above, the parties may set forth their contentions as to the period during which back pay should be considered, the rate of such pay, and any contentions with regard to omitting any persons from participating in such back pay or limiting the participation of any persons.

10. Collective Bargaining Agreements.

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall remain in and continue to have full force and effect, except insofar as such agreements are inconsistent with the provisions of this Order. Should a conflict arise between the provisions of a collective bargaining agreement and the provisions of this Order,

the terms of this Order shall prevail.

11. Notice.

The defendants shall give notice of this Order to all of their employees and members by posting copies of this Order on bulletin boards, located in conspicious places throughout the Company's operations in Reidsville, Rockingham County and throughout union facilities.

12. Costs and Attorneys Fees.

A. Plaintiffs are awarded their costs of this action to be taxed against the defendants.

B. Plaintiffs are entitled to recover reasonable attorneys fees and expenses as part of their costs of this action. In the absence of agreement between the parties, plaintiffs are directed to file with the Court a statement of services rendered in connection with this case. The defendants shall have twenty days thereafter to file their comments on the submission of plaintiff, giving special attention to the apportionment of costs and attorneys fees as between the defendants.

13. Records and Reports.

A. The Company shall maintain appropriate records of all actions taken pursuant to this Order, and shall allow counsel for the plaintiffs to inspect these records after fifteen days notice.

B. Over a period of two years the Company shall file with the Court and serve upon counsel for the plaintiffs a report each six months, beginning six months from the date of this order, said report to show the following information:

(1) The number of vacancies and the names, race and dates of employment of all persons considered for supervisory positions in Leaf and the name of each successful candidate.

(2) Any and all action, reports, and studies made by the Company or on behalf of the Company with respect to any screen tests which the Company may utilize as part of the selection process for craft positions.

14. Retention of Jurisdiction.

The Court retains jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate this Order.

A True Copy

Teste:

/s/ EUGENE A. GORDON
United States District Judge

Carmon J. Stuart, Clerk

Wayne N. Everhart, Deputy Clerk

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 74-1650

Edgar Russell, Frederick D. Broadmax, Alvis Motley, Jr.,
James A. Vaughn, Lawrence Price, Jr., Glen A. Lee,
Haywood Gilliam, James R. Kaylor,
Appellants,

versus

The American Tobacco Co., and Local 192,
Tobacco Workers International Union, an affiliate, AFL-CIO
Appellees.

United States Equal Employment Opportunity Commission,
Amicus Curiae.

No. 74-1652

Edgar Russell, et al., Appellees,

versus

The American Tobacco Co., et al., Appellants.

Appeal from the United States District Court for the
Middle District of North Carolina, at Greensboro.
Eugene A. Gordon, Chief Judge.

(Argued January 7, 1975. Decided Sept. 24, 1975)

Before WINTER, BUTZNER, and FIELD, Circuit Judges.

Robert Belton and O. Peter Sherwood (Jonathan Wallas, J. LeVonne Chambers, Jack Greenberg, Morris J. Baller; Chambers, Stein, Ferguson and Lanning on brief) for appellants; Charles T. Hagan, Jr. (Daniel W. Fouts; Adams, Kleemeier, Hagan, Hannah and Fouts on brief) for The American Tobacco Company; Julius J. Gwyn (Gwyn, Gwyn & Morgan on brief) for Local 192, Tobacco Workers International Union; Margaret C. Poles, Attorney, Equal Employment Opportunity Commission (William A. Carey, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for amicus curiae.

BUTZNER, *Circuit Judge:*

These appeals involve only a narrow aspect of a class action in which the district court properly granted black employees broad relief under Title VII of the Civil Rights Act of 1964 against the American Tobacco Company and Local 192 of the Tobacco Workers International Union, AFL-CIO. The district court found that at the company's Reidsville, North Carolina, Branch (Branch), the use of departmental seniority, subjective qualifications, and an excessive probationary period for promotions, transfers, pushbacks, and layoffs had unlawfully excluded black employees in the prefabrication department from working in the fabrication department, where better paying jobs had generally been reserved for white employees. Accordingly, the court ordered that these matters be controlled entirely by plant seniority and by a reduced probationary period. It enjoined the use of screening tests not approved by the Equal Employment Opportunity Commission. It found no discrimination in the appointment of supervisors at Branch.

The district court also found that at the company's Leaf Department (Leaf) in nearby Rockingham County, there had been discrimination in the choice of supervisors. Therefore, it required objective criteria for selecting supervisors and affirma-

tive action in appointing black employees to those positions. The court awarded back pay for some of the employees at Branch and Leaf. Neither the company nor the employees appeal these provisions of the decree.

The district court ruled that Branch and Leaf are separate operations because they are two miles apart, different work is done at each plant, and it is more efficient for the company to maintain their distinct identities. It concluded that "there is no justification in law or in fact for merging the two lines of seniority" at Branch and Leaf. The employees have appealed the denial of relief for Leaf employees. They also seek to enlarge the decree's provision for compliance reports. The union has filed a cross-appeal challenging the court's jurisdiction and complaining about the assessment of back pay.

For the reasons stated in Part I, we conclude that qualified black Leaf employees should be permitted to fill permanent vacancies in the fabrication department at Branch without sacrificing their Company seniority and that they, like the black employees at Branch, are entitled to back pay. In Part II we affirm the court's order for reports. For the reasons stated in Part III, we find no cause for reversal in the union's cross-appeal. Accordingly, with appropriate modifications to provide a remedy for the employees at Leaf, we affirm the district court's decree.

I

The company's Leaf department receives, processes, and stores both domestic and Turkish tobacco for use at Branch. Its management is separate and independent from Branch's management. Leaf employs 106 regular workers, approximately 69 percent of whom are black, and 127 seasonal workers from July to the following January, 97 percent of whom are black. When this suit was filed in 1968, the average hourly wages were approximately as follows: white Branch employees, $2.90; regular black Leaf employees, $2.50; and seasonal black Leaf

employees, $2.36.

The Reidsville Branch of the company receives tobacco from Leaf and makes it into cigarettes. Branch is organized into two departments – prefabrication and fabrication. Prefabrication receives tobacco from Leaf and blends, cuts, and dries it. The fabrication department manufactures filters and cigarettes, and packs, stores, and ships the finished products. Craft employees, such as electricians, tinsmiths, and welders, are classified in fabrication, but they perform duties in prefabrication as well. Some of the black Leaf employees also work at Branch, stemming tobacco.

The company's regular employees were formerly represented by racially segregated local unions. Local 192 was the bargaining agent for white employees, most of whom worked in Branch's fabrication department. The employees represented by the black union worked primarily in the Leaf department, in the prefabrication department, and as janitors in the fabrication department. Each union, and consequently, for practical purposes, each department, had a separate seniority roster. In October 1963, the racially segregated unions merged because of a directive from the United States Defense Supply Agency, issued pursuant to an executive order. The merger did not include seasonal employees, who continue to be represented by a separate union.

The merger, however, did not open the doors of the fabrication department to black employees. The district court found that through various practices both the company and the union discriminatorily preserved jobs in this department for white employees after the enactment of Title VII.

We agree with the district court that the seniority rosters of Branch and Leaf should not be merged. For example, it would be wasteful, as the appellants acknowledge, to use a merged seniority system to fill daily vacancies by shuffling employees between the plants. A company is entitled to the efficiencies it derives from maintaining separate departments and

seniority rosters if this can be done without discrimination. Cf. United States v. Chesapeake & Ohio Ry. Co., 471 F. 2d 582, 593 (4th Cir. 1972). But the inappropriateness of merging the seniority lists does not preclude permanent transfers of employees from Leaf to fabrication at Branch without loss of seniority.

If Branch and Leaf are both parts of the same operation, this case presents a straightforward application of the well-accepted principle that discriminatory hiring in departments of a business may be remedied by requiring the company to allow transfers between departments, based on plant-wide seniority. See, e. g., Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). The district court found that the company and the union had discriminated against black employees in staffing Branch's fabrication department. Therefore, if Leaf is considered to be another department of the company's cigarette manufacturing operations in the Reidsville area, the remedy for the discrimination found by the district court should include allowing Leaf employees to transfer to the fabrication department without losing their seniority.

If, on the other hand, Leaf and Branch are different locations, and if differences in treatment of workers at the different locations are not due to an intention to discriminate, the company's refusal to allow Leaf employees to transfer on the basis of company-wide seniority would not violate the Act. This is so because 42 U.S.C. § 2000e-2(h) provides in part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ."

Neither the Act nor the EEOC regulations define the statutory term "employees who work in different locations," and we deem it unwise to attempt to draft a definition for every situation. It is readily apparent, however, that the labor market is the most important criterion for determining whether a company's employees work in different locations. If the labor for each plant is recruited from different geographical areas, or if one plant requires labor possessing different skills from the labor employed at another company plant, it is obvious that the company cannot draw from the same labor market to man its plants. Under these circumstances, it generally can be said that the employees work at different locations. In contrast, if a company can operate two or more of its plants with employees from the same geographical area who are unskilled or possess the same skills, an applicant for a job can be assigned to an entry level position in either plant. Therefore, these employees, having been hired from the same labor market, would not generally fall within the statutory class of "employees who work in different locations."

In this case, the company draws from the same labor market for both Leaf and the fabrication department of Branch. The plants are only two miles apart, and employees come from the same geographical area. Moreover, there are entry level positions at both places that require neither particular skills nor experience. There are jobs in fabrication that can be filled just as well by an employee transferring from Leaf as by a person hired off the street or from the prefabrication department.

Other facts indicate that the employees at Leaf and Branch do not work at different locations within the meaning of the Act. The two plants constitute a single manufacturing process. All of Leaf's tobacco is used at Branch, and some of Leaf's employees work at Branch. The same office pays all employees, and the same bargaining agreement covers employees at both plants. The company has contractually reserved the right to shift employees from one plant to the other without de-

priving the transferees of seniority, and it has exercised this right on several occasions. Moreover, a company official testified that the "best reason and the only reason" for not allowing Leaf employees to initiate transfers to Branch with retention of seniority was the adverse effect on the seniority of Branch employees. But it is now settled that the mandate of Title VII should not be abated because enforcement of the law will frustrate the expectations of employees who have greater departmental but less company seniority than an employee who has been subjected to discrimination. Robinson v. Lorillard Corp., 444 F. 2d 791, 800 (4th Cir. 1971).

There is another reason why the exemption granted in § 2000e-2(h) is not available to the company. That section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." The evidence discloses that for a number of years the company overtly assigned white workers to the fabrication department and black workers to lower paying jobs in prefabrication and Leaf. Though this practice has been discontinued, its discriminatory effect survived the enactment of Title VII because the company prohibited black Leaf employees from seeking transfers to fabrication without forfeiting their seniority. Intentional segregation of the past that is perpetuated by a company's seniority system precludes the company from claiming that its system is bona fide within the meaning of § 2000e-2(h). United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971); Griggs v. Duke Power Co., 420 F. 2d 1225, 1236 (4th Cir. 1970), rev'd on other grounds, 401 U. S. 424 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980, 987 (5th Cir. 1969). Supported by the reasoning of these cases, we hold that when present differences in working conditions are remnants of past intentional discrimination, the proviso of § 2000e-2(h) bars a company from defending its employment practices on the ground that its employees "work in different locations."

The company and the union assert that in any event black seasonal employees at Leaf should be denied relief. These employees, however, perform substantially the same work and are paid at the same rate as many of the regular employees. Some of them work seasonally by choice because they are farmers; others would prefer regular work with the company but have found only seasonal employment available. Many have worked for a sufficient number of seasons to acquire significant company seniority. The record does not support the inference, nor did the district court find, that as a group they are inferior to regular workers. The fact that seasonal employees are represented by a different union presents no obstacle to their transferring to the fabrication department. United States v. Chesapeake & Ohio Ry. Co., 471 F. 2d 582, 591 (4th Cir. 1972).

Although the seniority rosters of Leaf and Branch need not be merged, we conclude that regular and seasonal black employees at Leaf who were hired before the company eliminated discrimination at fabrication should be permitted to transfer to that department as permanent vacancies occur in jobs they can perform. Further, they should receive the training for which they qualify. A transferee's new departmental seniority should be computed from his employment seniority date. The class of employees entitled to back pay should also be enlarged to include Leaf employees. We leave to the sound judgment of the district court the definition of the class of Leaf employees entitled to relief and the details of implementing our modification of its decree.

Regular and seasonal Leaf employees also seek entry into the prefabrication department, and many seasonal employees seek regular employment in Leaf on the basis of their company seniority. The district court, finding no racial discrimination in hiring at prefabrication and Leaf, denied their requests. We affirm because the Act does not oblige a company to allow black employees to transfer into departments that were always open to black applicants without discrimination. United States

v. Chesapeake & Ohio Ry. Co., 471 F. 2d 582, 588, 593 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F. 2d 652, 662 (2d Cir. 1971).

II

The appellants asked the district court to require the company to submit compliance reports for four years, furnishing information on all personnel action affecting members of the class to whom relief had been granted. The district court, however, did not fully grant this request. Instead, it directed the company to maintain records, open to inspection by plaintiffs' counsel, of all action taken pursuant to the decree. The court also required the company to file every six months for two years specific detailed information about appointments to supervisory positions and the tests selected by the company for use in filling craft positions. The court retained jurisdiction to enforce compliance with its order.

A district court must necessarily exercise broad discretion in determining what compliance reports are required. In United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953), the Court established standards for determining whether an injunction should be granted when the defendant ceases its illegal practices after suit has been filed. These standards are the good faith of the company's intent to comply, the effectiveness of its reform, and the character of its past violations. Although Grant differs factually, we believe that it may be adopted to furnish guidance whenever a district court must determine what compliance reports are appropriate.

Nothing in the record or in the briefs indicates the company intends to evade the court's decree. Before and after suit was filed, the company took steps to eliminate some of the discriminatory practices that existed in its plants. It has questioned the employees' interpretation of Title VII, but it has not defied the law. We conclude, therefore, that tested by the standards established in Grant, the district court did not abuse its discretion.

III

The union has raised numerous assignments of error. Because the district judge carefully considered each issue and fully stated the reasons for his rulings against the union, our discussion can be brief.

Contrary to the union's claim, the requirement of § 2000e-5(b) that a complaint be sworn is not a jurisdictional prerequisite to suit. The requirement "is directory and technical rather than mandatory and substantive." Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359 (7th Cir. 1968); accord, Georgia Power Co. v. EEOC, 412 F. 2d 462, 466 (5th Cir. 1969).

The union's defense that the suit was not timely is refuted by the facts. The Act formerly required a complainant to file suit within 30 days of receiving notice from the EEOC of his right to sue. The record discloses that notice to the plaintiff, Edgar Russell, was mailed in Washington, D. C., on December 5, 1967. Suit was filed on January 5, 1968. The union argues that since 31 days separate December 5 and January 5, and since the record does not show on what day Russell received notice, the suit may have been untimely and should be dismissed. The district court, however, recognized that a person is not charged with receiving a notice in North Carolina on the same day that it is mailed from Washington. See Federal Rules of Civil Procedure 6(e). It properly ruled that the suit was timely.

Russell's charge named the union as a respondent, but the EEOC failed to give the union notice of the charge and did not attempt concilation with it. The union maintains that the EEOC's omission deprived the court of jurisdiction. Similar contentions have frequently been rejected. A Title VII complainant is not charged with the commission's failure to perform its statutory duties. Dent v. St. Louis-San Francisco Ry. Co., 406 F. 2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R. R. Co., 405 F. 2d 645 (4th Cir. 1968).

While Russell's charge was not phrased with the specifity of a legal pleading, it adequately explained to the EEOC that

both the company and the union discriminated against black employees in job assignments and promotions. Measured by the standards of Graniteville Co. v. EEOC, 438 F. 2d 32, 37 (4th Cir. 1971), it provided a sufficient foundation for instituting this class action.

The union also challenges Russell's representation of Leaf employees because he works in Branch and his interests might conflict with those of a Leaf employee who has greater seniority. Title VII litigation, though nominally private, has "heavy overtones of public interest." Therefore, an individual employee may represent others who are also subject to racial discrimination, even though they work in different departments and the particulars of the discrimination are not identical. Jenkins v. United Gas Corp., 400 F. 2d 28, 33 (5th Cir. 1968). Moreover, Russell's effectiveness belies any notion that Leaf employees were denied the fair and adequate representation of their interests which Federal Rules of Civil Procedure 23 (a) (4) seeks to assure.

The only other assignment of error warranting discussion is the union's contention that it was erroneously assessed back pay along with the company. The evidence disclosed that many of the discriminatory practices about which the black employees complained were embedded in the bargaining agreement negotiated by the union. Further, it spurned the company's efforts to ameliorate some of the discriminatory terms of the agreements. The union contends, however, that because the black employees did not protest racial discrimination as a grievance and because they attended a meeting at which the current bargaining agreement was unanimously ratified, the district court erred by ordering it to contribute to the award of back pay.

Section 2000e-2 of the Act obliges unions, no less than employers, to refrain from unfair employment practices, and § 2000e-5(g) expressly authorizes back pay awards against labor organizations that violate the law. In neither section did Con-

gress absolve a union whose disadvantaged members acquiesced in the unfair conditions of employment, and there are sound reasons why courts should not engraft this exemption on the Act. Unions have long been required to negotiate for all their members without discrimination because of race, and they cannot bargain away the right to fair employment assured by Title VII. Steele v. Louisville & Nashville R. R. Co., 323 U.S. 192 (1944); Robinson v. Lorillard Corp., 444 F. 2d 791, 792 (4th Cir. 1971). Moreover, because of "the realities of entrenched employment discrimination," a worker need not complain, other than to the EEOC, as a prerequisite to judicial relief. Bing v. Roadway Express, Inc., 485 F. 2d 441, 451 (5th Cir. 1973); accord, Hairston v. McLean Trucking Co.,___ F. 2d ___, ___(4th Cir. 1975); but cf. Thornton v. East Texas Motor Freight, 497 F. 2d 416, 420 (6th Cir. 1974). We conclude, therefore, that transferring the burden of discrimination from the union, which is charged with eliminating it, to acquiescent members, who suffer from it, would subvert the remedial purpose of the Act.

Local 192 also argues that it would be inequitable to assess it for back pay because it is a non-profit organization with meager assets. It suggests that the company can better afford to pay the award. This argument rests on the faulty premise that back pay awards are only compensatory. Though punitive damages are not allowed, the award serves a dual purpose. In addition to compensating employees who have been wronged, the "reasonably certain prospect" of a back pay award is designed to induce unions, as well as employers, to voluntarily eliminate unfair labor practices. Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S., June 25, 1975); Hairston v. McLean Trucking Co.,___F. 2d___, ___(4th Cir. 1975). Accordingly, we affirm the district court's award of back pay against the union.

The judgment of the district court is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion. The appellants shall recover

from the company and the union their costs of appeal, including a reasonable attorney's fee in an amount to be determined by the district court.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 74-1650

EDGAR RUSSELL, et al., Appellants,

versus

THE AMERICAN TOBACCO CO., and
LOCAL 192, TOBACCO WORKERS INTERNATIONAL
UNION, an affiliate, AFL-CIO Appellees.

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, Amicus Curiae.

NO. 74-1652

EDGAR RUSSELL, et al., Appellees,

versus

THE AMERICAN TOBACCO CO., et al., Appellants.

ORDER

Upon consideration of the petitions for rehearing filed by the American Tobacco Company suggesting rehearing en banc and by Local 192, Tobacco Workers International Union;

With the concurrence of Judge Winter and Judge Field, and in the absence of a request for a poll of the entire court as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED:

1. The sentence on page 6 of the slip opinion stating:

"The merger did not include seasonal employees, who con-

tinued to be represented by a separate union"
is deleted.

2. The following sentence is substituted:

"Seasonal employees, however, continued to work under a separate bargaining agreement."

3. The last sentence on page 11 continuing to the top of page 12, which states:

"The fact that seasonal employees are represented by a different union presents no obstacle to their transferring to the fabrication department. United States v. Chesapeake & Ohio Ry. Co., 471 F. 2d 582, 591 (4th Cir. 1972)"

is deleted.

4. On page 17, a citation is corrected to read as follows:

Robinson v. Lorillard Corp., 444 F. 2d 791, 799 (4th Cir. 1971).

5. In all other respects, the petitions for rehearing are denied.

/s/ JOHN D. BUTZNER, JR.
United States Circuit Judge

MEILEN PRESS INC. — N. Y. C. 219

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1087

TOBACCO WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 192,

Petitioner,

v.

EDGAR RUSSELL, *et al.*,

Respondents.

OPPOSITION TO WRIT OF CERTIORARI

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OPPOSITION TO WRIT OF CERTIORARI

Statement

The history of discrimination in this case parallels patterns and practices of discrimination that have been found to be unlawful in other cases involving the tobacco industry.[1]

Petitioners do not challenge the findings below that the plaintiffs and the members of the class have been the victims of unlawful discrimination which in large measure was the result of a history of segregated local unions and a contractually mandated departmental seniority system.

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[1] *E.g.*, see *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Cooper* v. *Phillip Morris, Inc.* 464 F.2d 9 (6th Cir. 1972).

Reasons for Denying the Writ

The questions presented by Petitioner do not justify the exercise of this Court's certiorari jurisdiction on two grounds.

First Ground

The first two questions present issues of law that are well settled. There is no conflict in the circuits that the existence of an adopted contract does not exculpate the union from liability under Title VII of the Civil Rights Act of 1964 (as amended 1972), 42 U.S.C. §2000e et seq. Indeed this Court's decisions in *Alexander* v. *Gardner-Denver,* 415 U.S. 36 (1974) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975) confirm that rights protected under Title VII cannot be bargained away in the give and take of the collective bargaining process.

Second Ground

The third question presented raises an issue before this Court that was not addressed below. This question is not appropriate for review by this Court.

ARGUMENT

I

The Decision Below Was Correctly Decided.

In essence, Petitioners argue for adoption of a rule exculpating unions from responsibility under Title VII upon a mere showing that all its members are eligible to participate in a ratification vote and that no member actively opposed ratification of the contract which has the effect of discriminating against the union's black members.[2] The circuit courts are unanimously in agreement with Judge Butzner's decision below that when a union has entered into a contract which has the effect of unlawfully discriminating that union is responsible for a share of the monetary loss suffered by victims of the discrimination.[3] Petitioner's reliance on *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974) is inapposite because there the union was held not to be responsible. *Thornton* involved a company imposed a "no-transfer" rule which the union had actively opposed. 497 F.2d at 425. The ruling below for which the union seeks

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[2] There is a significant question of fact whether the discriminatees did vote for the contract. The record does not show that all the plaintiffs were at the vote meeting nor whether those that were did in fact vote for the agreement. (There was no secret ballot. Hand or voice voting, even if "unanimous," does not definitively establish that all present "voted.")

[3] *E.g.*, see *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Macklin* v. *Spector Freight System*, 478 F.2d 179 (D.C. Cir. 1973); *United States* v. *Navajo Freight Lines*, —— F.2d ——, 11 F.E.P. Cases 787 (C.A. 9, 1975).

review here relates to union responsibility for two contractually mandated rules,[4] which had the effect of unlawfully discriminating against the union's black members. As the Sixth Circuit stated in *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975):

> It has long been settled that a union must attempt to protect its minority members from discriminatory acts of an employer (citation deleted). This obligation requires a union to assert the rights of its minority members in collective bargaining sessions and not passively accept practices which discriminate against them (citation deleted). Acquiescence in a departmental seniority system which produces unequal treatment on the basis of race is sufficient to subject a union to liability under Title VII (citation deleted).

The decision in the Fourth Circuit is compelled by this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Moody*, this Court held that mere good faith was not a defense to liability for back pay since the twin objectives of Title VII are to compensate the employees for economic loss and to assure affirmative compliance with the Act. This Court made it amply clear in *Alexander* that rights and remedies under Title VII could not be confined within the borders of union contracts and arbitration procedures. "Title VII . . . concerns not the majoritarian process but an individual's right to equal employment opportunities," 415 at 51. Further, Petitioner's implication of waiver of rights by ratification of the con-

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[4] The two rules are a "lock-in" departmental seniority system and a six-month probationary period. As to the latter, the Company had proposed a shortening of the probationary period to 35 days but the union actively opposed this proposal in order to protect certain of its white members. See pages 13 and 14 of Appendix to Petition for a Writ of Certiorari.

tract thereby relieving it of liability is contrary to this Court's teaching in *Alexander:* "We think it clear that there can be no prospective waiver of an employee's rights under Title VII," 415 U.S. at 51.

Petitioner's theory of immunity from liability under Title VII makes a violation by the union of the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 29 U.S.C. §401, et seq. a condition precedent to liability under Title VII of the Civil Rights Act of 1964. The Congressional purpose in Title VII of compensating discriminatees and ending employment discrimination is independent of the statutory objective of Landrum-Griffin of ensuring union democracy. Compliance with Landrum-Griffin is not a license to violate Title VII.

II

Petitioner's Third Question Presented Is Not Appropriate for Review by This Court Because It Was Not Addressed by the Courts Below.

The question of Petitioner's liability for the discriminatory selection of foremen and assistant foremen by the Company was not addressed or decided by the courts below.

Petitioner's concern is that the lower court's determination of the amount of its back pay liability "might well include" [5] responsibility for failure to promote blacks to supervisory positions even though such promotion decisions are exclusively within the discretion of the Company.[6]

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[5] Page 11 of Petition for a Writ of Certiorari.

[6] The question of the extent to which the union is or is not responsible for the loss suffered by blacks who have been excluded from supervisory positions is presumably a disputed issue of fact which must be resolved by the district court in the first instance. For example, on remand the Company may seek to demonstrate

Petitioner's concern is premature since the lower court has not yet made any determination on this issue. Clearly this issue is not ripe for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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that while it alone selects foremen and assistant foremen, composition of the pool from which those foremen are selected results from operation of provisions of the collective bargaining agreement. The union might seek to prove that placement in jobs within the bargaining unit has little or nothing to do with selection for supervisory positions.